

1 in the past. And we made that clear by filing
2 a motion to compel on that subject that Your
3 Honor granted in part, and denied in part.
4 So, the idea that it was surprising that Dr.
5 Singer would look to FCC saying Comcast may
6 have discriminated in the past, including with
7 respect to these specific channels was not a
8 surprise. Mr. Orszag chose not to address
9 that.

10 The surprise was the night before
11 at 9:45 or 9:40, when he introduced a new
12 opinion. And that's what we're trying to work
13 with, so I don't object to what I now hear Mr.
14 Carroll suggesting, which is we will provide
15 him with a copy of the report tomorrow
16 morning. If Your Honor would like, we will
17 put it before the Court with a motion, and w
18 can deal with it that way. But that will be
19 our position, that if they're surprised, and
20 I certainly understand what Mr. Carroll is
21 saying. I don't like the idea of having to
22 deal with something like this at this point in

1 the trial. I don't fault him for being unhappy
2 with having to deal with something like this,
3 but I also didn't like having to deal with new
4 opinions from Mr. Orszag on the eve of his
5 testimony, and then having to depose him on
6 the last Sunday before trial.

7 That's all we're asking for, is
8 the same treatment on those two. So, if it's
9 agreeable to Your Honor, we'll provide the
10 report to them in the morning, we'll provide
11 it to the Court with a cover paper so that
12 Your Honor has our position.

13 MR. CARROLL: Your Honor, my only
14 point there would be, I don't think it should
15 go to the Court. I think you should provide it
16 to us first. We should have a chance to review
17 it, and I think that there should be a motion,
18 if you're seeking to submit it to the Court.

19 I don't -- I do object to the
20 presumption that you would send it to the
21 Court without our having seen it first,
22 without our having had an opportunity to

1 understand what it is because, again, I
2 haven't even seen it yet. But from its
3 description, it sounds like it's not taking on
4 Mr. Orszag's opinion as to the half that you
5 say he did. You want to offer some other
6 opinion that Dr. Singer could have offered
7 before. And I would have thought, Your Honor,
8 that before anything is submitted to the
9 Court, there should be some briefing on the
10 issue of why Dr. Singer didn't submit this
11 before.

12 I feel like we're hitting a dead
13 horse at this point, and taxing the patience
14 of Your Honor.

15 JUDGE SIPPEL: Yes.

16 MR. CARROLL: I do have a real
17 strong objection to this. I think that it's
18 Dr. Singer's effort to get a last word in that
19 he should have gotten in before on a subject
20 that I thoroughly examined him about, and
21 pretty hard on. And it's part of my
22 presentation to this Court on Dr. Singer, that

1 he didn't know the answer to whatever he's put
2 in his new report at the time he was on that
3 stand opining on the same subject matter. And
4 he should have known it then. And that's
5 another reason I don't think this should be
6 coming in now.

7 JUDGE SIPPEL: Well, both sides
8 have stated their position very well, but I
9 think what I'm going to have to do, and I'm
10 really -- I'm not so much interested about how
11 this hurts you, and how this hurts you. I'm
12 interested in how it hurts me.

13 There's a heck of a lot of
14 information in this record, and it's hard for
15 me to think that there's not enough in there
16 to make a decision on. But, on the other
17 hand, the last thing I want, the worst --
18 short of, as I say, short of destroying the
19 Treaty of Paris, the Treaty of Versailles, and
20 now we're coming up, I guess, with the Treaty
21 of Utrecht.

22 I'm going to put it back on you. I

1 want to see a -- what I want -- you're talking
2 about a three-page report with two
3 attachments. That's fine. That can be
4 handled by way of a motion, I think, that you
5 want to introduce that report for reasons of
6 X, Y, and Z. And then Mr. Carroll, of course,
7 will oppose it, or Mr. Carroll can say I
8 oppose it, but if I can depose on this, this,
9 and this. Well, what can he say more than you
10 an reconsider?

11 But I agree with the -- I mean,
12 that's basically the way these things, I
13 think, go. But I think Mr. Carroll is right,
14 I think he should have a look at what you want
15 to get in.

16 MR. SCHMIDT: We'll happily do
17 that, Your Honor.

18 JUDGE SIPPEL: And then try and
19 sit down and talk it out. Maybe you can hire
20 lawyers to figure out.

21 (Laughter.)

22 JUDGE SIPPEL: I mean, I think

1 we're tired. I think that's the long and
2 short of it. I might be -- next Monday I might
3 talk about it with a little different light,
4 but I -- as I say, what I fear the most, maybe
5 I didn't make this clear, was that somehow or
6 other this argument gets to be impressive up
7 on the 8th floor, or over with the Court of
8 Appeals, and they send it back to me to do it
9 again on that basis. I don't want to do that,
10 because I'll be probably working on the next
11 Comcast --

12 (Laughter.)

13 JUDGE SIPPEL: This is too hard.
14 No, this is -- that's the way I'm going to
15 leave it.

16 So, the procedure is this, you
17 come up with your report that Dr. Singer
18 signs, pass it over to Mr. Carroll for his
19 side to take a look at. And then you decide
20 what you're going to do, either -- you've got
21 a range of maybe 10 things you can do with it.
22 And if it turns out that it's something that

1 I have to resolve, then do it by motion.

2 MR. SCHMIDT: Perfect. Thank you.

3 JUDGE SIPPEL: But it's kind of a
4 strange -- it's a strange bird. If a witness
5 did only half of what he said he was going to
6 do, that you've got to come in and have
7 testimony on the half that he didn't do, and
8 he's going to get a chance of responding to
9 it, so that you'll end up doing what he --
10 he's going to end up doing the whole job.
11 You know, maybe another option would be to
12 just throw the testimony of both experts out,
13 and we'll start with something else.

14 (Laughter.)

15 JUDGE SIPPEL: I'm just kidding.
16 This is fine. No, you -- both teams have
17 really performed very well. And I'm confident
18 as the night follows the day that I'm going to
19 get excellent briefing, and I'm going to get -
20 - if the motion is filed, I'll be it's going
21 to be one of the most interesting motions I
22 ever handled.

(Laughter.)

MR. SCHMIDT: We appreciate that.

JUDGE SIPPEL: Now, what's the deal -- okay, so let's -- what's the deal now on the briefing schedule, proposed findings, and reply findings?

MR. SCHMIDT: I think what we have proposed, Your Honor, is -- and I think we have agreement on this, but please correct me if I'm wrong, would be that proposed findings of fact and conclusions of law, and a very thoughtful comprehensive joint glossary of terms would be filed on May 27th, 2011. A post trial brief with proposed recommended decisions, including any reply findings of fact and conclusions of law, and I think we're both very mindful of what Your Honor said on Friday, that that really is intended to be limited to true reply things, not just rearguing everything, would be due June 10th, 2011.

We've talked to our colleagues at

1 the Enforcement Bureau. They would provide
2 their comments on June 24th, 2011, and then we
3 would be at Your Honor's convenience in terms
4 of an oral argument date, but we would propose
5 something starting on July 1st, or at a later
6 date that works for Your Honor.

7 I do have these dates written down
8 on a sheet of paper, which may be easier, if
9 I could pass this up. And you guys, I think,
10 have a copy of this.

11 JUDGE SIPPEL: Well, it shouldn't
12 be anything difficult. It's just a question of
13 some dates.

14 MR. SCHMIDT: Yes, it's three
15 dates.

16 JUDGE SIPPEL: Yes, I've got June
17 10, I've got June 24, and then --

18 MR. SCHMIDT: May 27th.

19 JUDGE SIPPEL: -- about arguing
20 for whatever it's going to be about closing
21 arguments, but what was the first date you
22 gave me? That's for --

1 MR. SCHMIDT: May 27th, Your Honor.

2 JUDGE SIPPEL: May 27th, so that's
3 -- May 27th, now we're into May right now.

4 MR. SCHMIDT: Yes.

5 JUDGE SIPPEL: May 27th you're
6 going to have your proposed findings in?

7 MR. CARROLL: That's a very tight
8 schedule, and if there's going to be some
9 additional work on a new expert analysis, I'd
10 like, after I see this report tomorrow, I'd
11 like the chance to discuss with the other
12 side. I mean, we rushed this schedule at their
13 request yesterday when we were discussing this
14 without understanding we were going to have
15 loose ends like this. Frankly, Your Honor,
16 that's a tighter date than we would have been
17 comfortable with.

18 JUDGE SIPPEL: I wasn't -- I'll
19 tell you what -- well, have you factored in
20 that, first of all, you have to wait until you
21 get all the transcript -- all the transcript
22 work has to be done by the court reporter.

1 Now, that should be the starting date for when
2 you're going to -- from the time you have the
3 full transcript record, then that's day one
4 for starting the job. And, normally, that's a
5 30-day -- I mean, even in a normal hard fought
6 case, there's usually at least 30 days. That's
7 going to take you past the 27th.

8 MR. SCHMIDT: They have been
9 remarkably quick. We have every day but today
10 already, and I think we'll -- I don't want to
11 speak for the court reporter, but I suspect
12 based on the practice we'll have today's
13 transcript tomorrow. So, I don't think that
14 will be an impediment.

15 JUDGE SIPPEL: And what's the
16 reason -- why are you pushing for a compressed
17 schedule? I'll put it in a very broad sense
18 that way.

19 MR. SCHMIDT: Well, what we did
20 was we went back and looked at the NFL
21 schedule and used that as our starting point.
22 And, as I recall, in the NFL schedule we

1 initially had a tighter time line. I think we
2 realized during the process that it wasn't
3 working, so we actually extended the time line
4 a little bit. So this is, I think, slightly
5 more compressed than the NFL schedule, but the
6 reason that we're pressing for it is very
7 simple. For our client, the timing of this is
8 remarkably important in terms of doing
9 everything we can a prompt resolution of it.
10 Our client finds itself going through a big
11 cycle in the summer in terms of the summer
12 Grand Slams, and anything -- it's incumbent on
13 us to represent our client's best interest, to
14 do anything we can to try to get the record to
15 Your Honor in as quick a time as possible
16 because, literally, every month that goes by
17 from our client's point of view makes a huge
18 difference to them in terms of how they do,
19 and the impact of Your Honor's decision on
20 them. That's really what was driving it.

21 JUDGE SIPPEL: Well, I don't deny
22 that, but has your client been shown the

1 schedule, the mutations of WealthTV when it
2 left, when it came to me, and how I had to do
3 it in 60 days. And then when it left me, it
4 was -- what are we talking about, how many
5 years ago? It's more than one year. So, what
6 does your client think that he's going to get
7 out of this if we do it on your schedule, and
8 not add a couple of days here, and a couple of
9 days there?

10 MR. SCHMIDT: I don't think we
11 would object to adding a few days here, and a
12 few days there. And, in fact, that's what
13 we've been doing. We initially had a tighter
14 schedule, and talked to them, and ended up
15 putting in more time. I don't think we've have
16 an objection to putting in more time. I think
17 our just guiding principle, Your Honor, is we
18 want to try to do it as quickly as we can.

19 MR. CARROLL: Your Honor,
20 following up on your point, I agree with the
21 perspective, and I get that their client may
22 be eager, but I don't think in the scheme of

1 things some up front time here that lets the
2 lawyers put in a polished product for you.

3 JUDGE SIPPEL: Well, that's what I
4 want. I mean, this is going to be a -- I
5 think it's going to be a hard record to get
6 through, particularly, if it's done what I
7 would think to be the right way. I mean,
8 there's -- I don't mean to say that you would
9 not do it the right way, but this is a tough
10 record.

11 MR. SCHMIDT: If our colleagues on
12 the other side are asking for a little more
13 time, we don't object to that.

14 MR. CARROLL: Maybe, Your Honor,
15 what makes sense is we have to confer tomorrow
16 after we see this new report, let us confer
17 one more time on the schedule and see if we
18 can come back with something on that.

19 JUDGE SIPPEL: Okay.

20 MR. CARROLL: Is that all right?

21 JUDGE SIPPEL: Well, if I'm in
22 Germany, you can email me. But I don't know

1 how --

2 MR. CARROLL: We'll send it in
3 German, get the transcript --

4 JUDGE SIPPEL: No, I've got my
5 Blackberry with me. I can get messages.

6 MR. CARROLL: Okay.

7 MR. SCHMIDT: Thank you, Your
8 Honor.

9 JUDGE SIPPEL: I don't know what
10 you're going to get back, or when you're going
11 to get it back. But I tell you, if the -- you
12 know, if the Navy Seals had touched base with
13 me, you know, now I'm stuck with a situation
14 where they've got some kind of a special
15 travel advisory from the State Department. I
16 don't know where the heck I'm going to be. I
17 mean, why couldn't they have waited a couple
18 of days?

19 (Laughter.)

20 MR. CARROLL: It is shocking that
21 they didn't consult --

22 JUDGE SIPPEL: It is shocking.

1 (Laughter.)

2 JUDGE SIPPEL: But that's life.

3 MR. CARROLL: Your Honor, may I
4 say on behalf of both sides, that -- do you
5 have something else you want to say?

6 MR. SCHMIDT: Go ahead. You were
7 going to say what I --

8 MR. CARROLL: Both sides, thanks
9 again for all the courtesies of your
10 courtroom, thanks again to Ms. Gosse, who has
11 been fantastic, and getting us through
12 security with all of our documents for the
13 past week and a half. It's been as pleasurable
14 as these things can be, and we appreciate it
15 very much.

16 MR. SCHMIDT: Yes. And we
17 absolutely join in that, Your Honor. As I
18 alluded to, this case could not be of greater
19 interest to our client. We appreciate Your
20 Honor hearing it, and we appreciate everyone's
21 working with us on this, so we're very, very
22 grateful.

1 JUDGE SIPPEL: Well, thank you
2 very much. It's been another great
3 professional experience, what do we call that,
4 a milestone? I can't do milestones any more.

5 MR. SCHMIDT: Once every two
6 years, Your Honor, we'll be back.

7 JUDGE SIPPEL: Thank you very
8 much, and we're in -- I think we're in recess
9 until my next call, and I'm going to just --
10 you know what to do. I'm not going -- in other
11 words, I'm not going to give you a date
12 certain when you have to give me this, that,
13 or the other thing on scheduling. But if it
14 comes in and Ms. Gosse can get it to me
15 wherever I may be in Europe, I will look at
16 it.

17 MR. SCHMIDT: Thank you, Your
18 Honor.

19 JUDGE SIPPEL: Thank you. Have a
20 good trip back to wherever you're going.

21 (Whereupon, the proceedings went
22 off the record at 5:59 p.m.)